3-1800-15206-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Denial of the License of Lisa Anderson to Provide Family Child Care	**RECOMMENDED ORDER GRANTING THE DEPARTMENT'S MOTION FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge Kathleen D. Sheehy pursuant to a Notice of and Order for Hearing dated November 20, 2002. On December 18, 2002, the Department of Human Services filed a Motion for Summary Disposition. On December 30, 2002, the Applicant filed a Memorandum in Opposition to the Motion for Summary Disposition, at which time the record with respect to the motion closed.

Vicki Vial-Taylor, Assistant County Attorney, 525 Portland Avenue South, 12th Floor, Minneapolis, Minnesota 55415, appeared on behalf of the Department of Human Services. Robert J. Healy, Attorney at Law, Metropolitan Law Offices, 649 Grand Avenue, St. Paul, Minnesota 55105, appeared on behalf of the Applicant, Lisa Anderson.

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY RECOMMENDED that the Motion for Summary Disposition filed by the Department of Human Services be GRANTED.

Dated: January 21, 2003.

KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

This Order is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Recommended Order of the Administrative Law Judge. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Recommended Order has been made available to the parties to the proceeding for at least ten days and an opportunity has

been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Parties should contact the Office of the Commissioner, Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155; telephone 651-296-2701, for further information regarding the filing of exceptions and the presentation of argument.

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Recommended Order will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with Minn. Stat. § 14.62, subd. 2a, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the Recommended Order and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

MEMORANDUM

In this contested case proceeding, Lisa Anderson has appealed the decision by the Department of Human Services ("DHS" or "the Department") to deny her application for a family child care license. The Department has moved for summary disposition on the grounds that there are no material issues of fact in dispute and it is entitled to disposition of this case in its favor as a matter of law. Summary disposition is the administrative equivalent of summary judgment.[1] Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[2] A genuine issue is one that is not a sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.[3]

The moving party must demonstrate that no genuine issues of material fact exist.[4] If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts are in dispute that can affect the outcome of the case.[5] The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.[6] The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.[7] The nonmoving party also has the benefit of the most favorable view of the evidence. All doubts and inferences must be resolved against the moving party.[8]

Factual Background

Based upon the materials submitted by the parties, it appears that the facts in this matter relevant to the Motion for Summary Disposition are as follows. Ms. Anderson was previously licensed to provide family child care. On July 7, 2000, Ms. Anderson's license was placed on conditional status for one year due to various alleged rule violations.[9] On October 31, 2000, the DHS revoked her license based upon

findings that she had failed to comply with the terms of her conditional license.[10] Ms. Anderson did not appeal the order of license revocation.[11] As a result, no hearing was held before an Administrative Law Judge concerning the revocation. On December 4, 2000, the DHS informed Ms. Anderson that she was prohibited from providing legally unlicensed child care but could care for children related to her. In the letter, the Department warned Ms. Anderson that it was a misdemeanor to continue to operate a family child care home in violation of Minn. Stat. § 245A.03, subd. 2b(1).[12] On April 12, 2002, a citation was issued to Ms. Anderson for operating an unlicensed child care program. On May 15, 2002, Ms. Anderson entered a guilty plea with respect to that citation, and submitted an application for a new license to provide family child care.[13] On August 14, 2002, the County recommended that the application be denied based upon Minn. R. 9502.0341 and Minn. Stat. § 245A.03, subd. 3.[14] On September 30, 2002, DHS denied Ms. Anderson's application for a new license. The decision to deny the application was based in part upon Minn. Stat. § 245A.08, subd. 5, which precludes the granting of a new license for five years after a previous revocation.[15]

Ms. Anderson filed a timely notice of appeal, resulting in the initiation of the present contested case proceeding.[16] In an affidavit filed in conjunction with her appeal, Ms. Anderson indicated that she wanted to appeal the denial of her license and request a hearing on the grounds that "the original revocation was based on conduct due to serious injuries from motor vehicle accidental injuries." She also asserted that "the allegations of any problems with children were not proven" and that she misunderstood the licensing requirements. Ms. Anderson further indicated that she wanted to appeal the denial on hardship grounds and request a waiver of the five-year ban on applications following a revocation because operation of the day care is her sole means of support and she has an excellent day care facility.

Parties' Arguments and Analysis

In its motion for summary disposition, the Department argues that Ms. Anderson's application was properly denied because her previous license was revoked on October 31, 2000. The Department points out that Minn. Stat. § 245A.08 requires that a new license not be granted for five years following revocation. The DHS maintains that there are no genuine issues of material fact that have a bearing on the outcome of this case and the Department is entitled to judgment as a matter of law.

Ms. Anderson opposes entry of summary disposition and contends that she is entitled to a full hearing on her fitness and qualification to run a day care center. Ms. Anderson's attorney asserts that Ms. Anderson was disabled at the time she received the notice of revocation due to serious injuries sustained in a motor vehicle accident on October 15, 2000, did not understand or seek counsel regarding the notice of revocation, lacked knowledge of the technical rules governing the license, misunderstood the status of her license, did not understand what she was told by an unidentified "clerk," and did not understand the amount of time that she had for filing an appeal of the earlier revocation. No additional supporting affidavit was filed with respect to the contentions made by counsel in opposition to the motion, although Ms. Anderson

alluded to some of these points in the affidavit she filed in connection with her notice of appeal.

Minn. Stat. § 245A.08, subd. 5, states that "[a] license holder . . . whose license has been revoked because of noncompliance with applicable law or rule must not be granted a license for five years following the revocation." It is evident that Ms. Anderson has reapplied before the expiration of five years following the earlier revocation of her license. Because the dates of the revocation order and the new application are not in dispute, the Administrative Law Judge has concluded that there is no genuine issue of material fact remaining for hearing and the Department is entitled to prevail as a matter of law.

It would not be proper, as requested by counsel for Ms. Anderson, to permit the present contested case hearing to focus on the propriety of the earlier license revocation. Minn. Stat. § 245A.07, subd. 3(a), specifies that "[t]he appeal of an order suspending or revoking a license must be made in writing by certified mail and must be postmarked and sent to the commissioner within ten calendar days after the license holder receives notice that the license has been suspended or revoked." The statute thus does not provide for extensions or exceptions to the ten-day appeal period. The order of revocation issued to Ms. Anderson clearly informed her of her right to appeal the decision within ten calendar days after receipt of the notice, in conformity with the statute.[17] When Ms. Anderson failed to appeal the DHS' revocation order issued on October 31, 2000, that order became final. No contested case proceeding was ever initiated with respect to that order. As a result, the Administrative Law Judge has no jurisdiction in connection with that order and is precluded from further reviewing the grounds for the revocation.[18] Although it is possible that a remedy may be available to the Applicant in some other forum if, in fact, she was prevented by disability from appreciating the consequences of the revocation order or acting to appeal the order, there is no jurisdiction in the present proceeding to reexamine the basis for the earlier revocation.[19] Accordingly, it is recommended that the Department's order denying Ms. Anderson's application be affirmed. The hearing scheduled for January 23, 2003, is hereby cancelled.

The Administrative Law Judge notes that Minn. R. 9502.0341, subp. 11, specifies that the DHS may, after two years, grant a variance to the provision requiring that a new license may not be granted for five years following revocation "if the applicant then substantially meets all provisions of parts 9502.0315 to 9502.0445." Specific procedures for requesting a variance are set forth in Minn. Stat. § 245A.04, subd. 9, Minn. R. 9502.0335, and Minn. R. 9543.0050. This Recommended Order does not preclude Ms. Anderson from submitting a written request for a variance to the agency in accordance with the rules governing family child care. The Commissioner's decision to grant or deny a variance request is final and not subject to appeal under Chapter 14.[20]

K.D.S.

[1] Minn. R. 1400.5500 (K).
[2] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03; Minn. R. 1400.5500 (K).
[3] *Illinois Farmers Insurance Co. v. Tapemark Co.,* 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateauv. Minnesota Department of Public Welfare,* 356 N.W. 2d 804, 808 (Minn. App. 1984).
[4] *Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).
[5] *Highland Chateau*, 356 N.W.2d at 808; *Hunt v. IBM Mid America Employees,* 384 N.W.2d 853, 855 (Minn. 1986).
[6] *Id.; Murphy v. Country House, Inc.,* 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); *Carlisle v. City of Minneapolis,* 437 N.W.2d 712, 715 (Minn. App. 1988).
[7] *Carlisle,* 437 N.W.2d at 715 (*citing Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986)).
[8] *See Celotex,* 477 U.S. at 325; *Thiele v. Stich,* 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich,* 185 N.W.2d 876, 878 (Minn. 1971); *Dollander v. Rochester State Hospital,* 362 N.W.2d 386, 389 (Minn. App. 1985).
[9] Affidavit of Tim Hennessey, Ex. 2 and Ex. 3, Attachment C.
[10] Hennessey Aff. at ¶ 3.0 and Ex. 2.
[11] Hennessey Aff., Ex. 3 and Attachment B.
[12] Hennessey Aff., Ex. 3, Attachment B.
[13] Hennessey Aff. at ¶ 2.0 and Ex. 1. Ms. Anderson was sentenced to serve 30 days in the Hennepin County Adult Correctional Facility (stayed upon conditions) and was assessed a fine of $50.00. Hennessey Affidavit, Ex. 3, Attachment D.
[14] Hennessey Aff. at ¶ 4.0 and Ex. 3.
[15] Hennessey Aff. at ¶¶ 5.0 and 6.0 and Ex. 4. The letter notifying Ms. Anderson of the denial of her application also pointed out that Ms. Anderson had failed to comply with the terms of her prior conditional license and had pled guilty to the offense of operating an unlicensed child care program on April 12, 2002, despite being informed of the prohibition against providing legally unlicensed child care in a letter dated December 4, 2000.
[16] Hennessey Aff. at ¶ 7.0 and Ex. 5.
[17] Affidavit of Hennessey, Ex. 2; Minn. Stat. § 245A.07, subd.3(a).
[18] *See, e.g., In the Matter of the Claims Against Grain Buyer's Bond No. BR-7712*, OAH Docket No. 69-0400-9025-2 (1994) (due to failure to file a timely appeal, the Department's determination that a claim was ineligible became final; the lack of a properly filed appeal denies jurisdiction to the Department and the Administrative Law Judge); *In re Kindt*, 542 N.W.2d 391 (Minn. App. 1996) (benefit termination letter provided sufficient notice that the individual was not eligible for medical assistance benefits, and guardian's failure to act within the statutory appeals period made the challenge of the discontinuation of benefits untimely); *Nieszner v. Minnesota Dept. of Jobs & Training*, 499 N.W.2d 832 (Minn. App. 1993) (failure of the employer to file a timely appeal from the initial determination that the employee was qualified to receive unemployment benefits made the initial determination final and precluded further review of the employee's claim).
[19] Even if the Administrative Law Judge had jurisdiction to consider this claim in the present proceeding, it is unlikely that the sketchy information concerning the nature and effect of the Applicant's injuries provided in connection with the Memorandum in Opposition to the Motion and the Applicant's notice of appeal would be sufficient to establish the existence of a genuine issue of material fact requiring a hearing.
[20] Minn. Stat. § 245A.04, subd. 9.